STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH NORWOOD,

Defendant-Appellant.

UNPUBLISHED
July 6, 2004

No. 245794
Muskegon Circuit Court
LC No. 02-046893-FH

Before: Judges White, PJ, and Markey and Owens, JJ.

PER CURIAM.

Defendant was convicted after jury trial of possessing with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), based on an incident in which he was arrested possessing crack cocaine and $2,960[1] in cash on December 13, 2001. He was sentenced to one to thirty years' imprisonment as a second felony offender, MCL 769.10. Defendant appeals by right contending the trial court abused its discretion by permitting the prosecutor to present rebuttal evidence and that he was denied effective assistance of counsel because counsel did not raise a proper objection to the rebuttal evidence. We find defendant's arguments without merit; therefore, we affirm.

Defendant chose to testify at trial. During his direct examination, defendant testified that he had about $3,000 on his person when arrested. Defendant also admitted he possessed six lighters but denied he intended to use them to smoke crack cocaine and denied that he used crack cocaine. Defendant also denied he possessed cocaine. When the police advised defendant he was being arrested for selling cocaine, defendant told them he did not sell cocaine.

Defendant continued his direct testimony by noting when he arrived at the police station he expected to be strip searched but was not; instead the police took his wallet, cell phone,

[1] The police testified they recovered twelve $5 bills, thirty-eight $10 bills, ninety-six $20 bills, six $50 bills, and three $100 bills from defendant's person. About forty minutes after his arrest, the police also found additional cocaine in the form of a large rock of crack in a plastic bag on the ground at the point of defendant's arrest.

lighters and money out of his pockets and put them on a table. Defendant testified cocaine was not among the items removed from him and on the table. Defendant also asserted he did not keep anything in his front right pocket because his right hand had been injured. According to defendant, an officer came into the room, and after walking directly up to him, reached into defendant's front right pocket and pulled out two round balls in a plastic bag. Defendant testified that the items were not his and that another officer had had his hand in the same pocket earlier.

Defendant also testified he would occasionally leave his daughter with a sister who lived in Muskegon and that when he was arrested he planned to travel to Virginia for a five-day Christmas visit with his mother and another sister in Washington, D.C. According to defendant, the money he possessed when arrested was intended to buy Christmas gifts for family members and for travel expenses. Defendant testified he had saved one-half the money from music royalties and the other half was provided by his mother for the Christmas visit. Defendant again denied he intended to sell or transfer cocaine at the point he was arrested and denied possessing cocaine at the scene of his arrest or later at the police station.

After defendant concluded his direct testimony, the prosecutor moved outside the presence of the jury to be permitted to introduce evidence that (a) defendant told the police he had been in "rehab" for cocaine use and (b) in September 2002 had been found in a house containing cocaine and counting $2000 in cash. The prosecutor categorized defendant's testimony as asserting: "I don't use cocaine . . . I'm not selling cocaine . . . I'm not a cocaine person."

Defense counsel claimed surprise, initially asserting no police reports disclosed that defendant told the police he had been in rehab for drug use but then acknowledged having received such a report. Counsel also objected because the prosecutor had not given notice of the proposed evidence under MRE 404(b). Counsel also noted that because defendant faced criminal charges[2] arising out of the September 2002 incident, permitting the proposed evidence on cross-examination would create a dilemma for defendant regarding his Fifth Amendment rights.

The trial court did not view the proposed evidence as subject to analysis under MRE 404(b) but rather proper impeachment because defendant placed his credibility at issue by choosing to testify. Accordingly, the trial court ruled that the prosecutor would be permitted to present the proposed evidence because it was relevant to rebut the direct testimony of defendant and recessed the trial to permit defense counsel to review applicable police reports.

[2] On the same day of the sentencing proceeding in the instant case, defendant pleaded guilty to possessing with intent to deliver less than 50 grams of cocaine arising out of the incident that occurred on September 24, 2002, while defendant was on bond pending trial in the instant case. Defendant's sentence in the instant case was later amended to reflect it was consecutive to his sentence for the September 2002 offense.

After the recess, the parties agreed that the prosecutor would present the proposed evidence in rebuttal, rather than through cross-examination of defendant. Without waiving defendant's earlier objection, defense counsel agreed the evidence was proper rebuttal. Counsel also requested that the jury be instructed that the rebuttal evidence was limited to impeachment only and could not be used as substantive evidence of defendant's guilt; the prosecutor and the trial court agreed.

During cross-examination, although defendant's testimony clearly implied that the police had planted drugs on him, defendant refused to draw "that deduction." Defendant admitted he had no evidence to substantiate his claim to lawful sources for the cash he possessed when arrested. Defendant denied he told Detective Dale Young after his arrest in the instant case that he had been in rehab for crack cocaine use but instead told the police that he had been in vocational rehab because of the injury to his hand. Defendant repeated his assertion that he did not intend to deliver cocaine on the day he was arrested, and did not possess any cocaine that day.

After the defendant's testimony was concluded, the defense rested, and the trial court instructed the jury as follows:

> . . . The prosecutor has indicated he wants to present some rebuttal witnesses and rebuttal exhibits. I'm going to allow the rebuttal for a limited purpose. I'm going to allow the prosecutor to present the rebuttal testimony and rebuttal exhibits only for the purpose of the prosecutor's right to challenge the credibility of the Defendant's testimony given on the stand.
>
> You must not take this rebuttal testimony as substantive evidence of Defendant's guilt in this case in this charge. You may only consider it and weigh it to determine whether you find the Defendant's testimony believable and credible. You may give that rebuttal testimony whatever weight you think it deserves.

In rebuttal, Detective Young denied "planting" drugs on defendant; nor did any other police officer. Young testified that defendant told him he had been in rehab for cocaine and marijuana use.

Sergeant Barthelemy also denied "planting" drugs on defendant; nor did any other police officer. Barthelemy also testified that defendant said he had been in rehab for cocaine and marijuana use. Barthelemy admitted that defendant told the police he had income from a record company.

Detective Steve Waltz then testified that he helped execute a search warrant at a residence on September 24, 2002. The police found defendant in the residence sitting on a couch with a girl counting currency totally $2,063, mostly $20 bills. Waltz testified that the police also found in the house six individually wrapped bags of crack cocaine in a bathroom, an ounce of

powder cocaine in a bedroom, and a mayonnaise jar with cocaine residue in the kitchen, which was consistent with "cooking"[3] crack cocaine. Waltz also testified that the house was very neat and contained female clothing as well as very large male clothing that would fit defendant.[4] Defendant said the money he was counting belonged to him and that he stayed at the residence.

Defendant offered no surrebuttal. The jury convicted defendant as charged.

Defendant first argues on appeal that the trial court plainly erred by admitting the rebuttal evidence, which seriously affected the fairness and integrity of the trial. We disagree.

The admission or exclusion of evidence by the trial court is reviewed for a clear abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). Likewise, the trial court's decision to admit or exclude rebuttal evidence will not be disturbed on appeal absent a clear abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the trial court's decision. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). If preserved, evidentiary trial error does not merit reversal unless it involves a substantial right, and after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

In this case, defendant did not preserve his claim on appeal that the evidence was improper rebuttal by specific objection in that regard in the trial court. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Accordingly, we review defendant's claim of error to determine if it is plain, clear or obvious, and whether the alleged error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW 2d 130 (1999); *People v Rice* (*On Remand*), 235 Mich App 429, 442; 597 NW2d 843 (1999). Defendant bears the burden of establishing that the error was outcome determinative. *Id.* Moreover, reversal is warranted only if defendant is actually innocent, or the error seriously affected the fairness, integrity, or public reputation of the trial, independent of the defendant's innocence. *Id.*

Rebuttal evidence is admissible if it contradicts, refutes, explains, disproves, or weakens evidence introduced, or a theory developed by the other party. *Figgures, supra* at 399. Because the purpose of rebuttal is to weaken the opponent's case, and not to merely verify that of the proponent, whether rebuttal is proper depends on the evidence and theories the defendant introduces. *Id.* A party may only introduce evidence during rebuttal if it responds to evidence introduced or a theory developed by the opponent. *Id.*; *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001). Our Supreme Court explained,

> . . . the test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief,

[3] "Cooking" cocaine refers to transforming powder cocaine into crack cocaine.

[4] On cross-examination, defendant acknowledged that he was known as "Fat Joe" but denied it was a "street name" but rather a descriptive moniker common in the music business.

> but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief. [*Figgures, supra* at 399 (citations omitted).]

In the case at bar, the rebuttal evidence directly responded to defendant's testimony during direct examination that he did not possess cocaine, he did not use cocaine, and he did not intend to sell or deliver cocaine. The rebuttal evidence also weakened defendant's testimony that the $2,960 in cash he possessed had a legitimate source and was intended for family Christmas presents and holiday travel expenses. The prosecutor did not use cross-examination to revive a right to introduce evidence that could have been introduced in its case-in-chief. *People v Losey*, 413 Mich 346, 352; 320 NW2d 49 (1982). Nor did the prosecutor inject a collateral and immaterial issue into the case by eliciting a denial on cross-examination. *People v Hernandez*, 423 Mich 340, 351-352; 377 NW2d 729 (1985). Instead, the prosecutor used the rebuttal evidence only to refute material evidence and a theory that defendant introduced. *Id*., at 351, citing *People v Bennett*, 393 Mich 445; 224 NW2d 840 (1975) (rebuttal is limited to refutation of relevant and material evidence); *Figgures*, *supra* at 399. Thus, the trial court did not abuse its discretion by admitting the rebuttal evidence. *Id*. at 400.

Defendant misplaces his reliance on the statement in *People v McGillen #1*, 392 Mich 251; 220 NW2d 677 (1974): "Generally, the only type of contradictory evidence that is admissible is that which directly tends to disprove the exact testimony given by a witness." By parsing testimony into past, present, or future tense, defendant argues that the rebuttal evidence did not "directly" contradict the "exact" testimony of defendant. But *McGillen*, and other cases defendant relies on do not limit the rule of logical relevance or hold that "relevance" is more restricted when rebuttal evidence is at issue. Rather, as noted *supra*, rebuttal evidence must contradict, refute, explain, disprove, or weaken the opponent's relevant and material evidence or theories. *Figgures*, *supra* at 399; *Hernandez*, supra at 351.

By creating the impression before the jury that he was not involved at all with cocaine and was being framed by the police, defendant open the door to evidence that might otherwise not have been admissible in the prosecutor's case-in-chief. See, e.g., *People v Crawford*, 458 Mich 376; 582 NW2d 785 (1998). In *Figgures*, *supra*, the defendant was charged with breaking and entering with intent to commit a felonious assault upon his ex-spouse. The defendant testified on direct examination that he and the complainant were reconciling, and denied having harassed her. *Id.* at 399-400. Our Supreme Court explained that the defendant's testimony had attempted to "create the impression he would not have assaulted the complainant" and opened the door to the rebuttal evidence introduced by the prosecutor, which "responded to evidence and impressions raised by defendant during direct examination." *Id.* Likewise, the testimony and impressions defendant attempted to raise in the case at bar opened the door to the rebuttal evidence introduced by the prosecutor. The trial court did not abuse its discretion by admitting the rebuttal evidence. *Id.*

Defendant's argument that the rebuttal evidence was inadmissible under MRE 608(b) also lacks merit. That rule, in essence, states the general rule that a witness may not be impeached on a collateral matter. "As a general rule, a witness may not be contradicted as to

collateral, irrelevant, or immaterial matters, and, accordingly, subject to some qualifications, where a party brings out such matters on cross-examination of his adversary's witness, he may not contradict the witness' answers." *McGillen, supra* at 266-267, quoting 98 CJS, Witnesses, §§ 632, 633. But, "[a] party is free to contradict the answers which he has elicited from his adversary or his adversary's witness on cross-examination as to matters germane to the issue." *Id*. See also *People v Rosen*, 136 Mich App 745, 758-759; 358 NW 2d 584 (1984), citing McCormick, Evidence (2d ed), § 47, pp 98-99, and noting that testimony "directly relevant to the substantive issues in the case" or testimony "of the background and circumstances of a material transaction which as a matter of human experience [the witness] would not have been mistaken about if his story were true" are among matters deemed not collateral, therefore subject to impeachment through extrinsic proof.

This Court recently adopted this view of MRE 608(b). *People v Spanke*, 254 Mich App 642; 658 NW2d 504 (2003). "Although MRE 608(b) generally prohibits impeachment of a witness by extrinsic evidence regarding collateral, irrelevant, or immaterial matters, a party may introduce rebuttal evidence to contradict the answers elicited from a witness on cross-examination regarding matters germane to the issue if the rebuttal evidence is narrowly focused on refuting the witness' statements." *Spanke, supra* at 644-645, citing *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995), which in turn, cites *McGillen, supra*, and 98 CJS, Witnesses, §§ 632, 633, pp 649-655. Because the rebuttal evidence in this case refuted or weakened testimony on material, substantive issues in the case, it was not subject to exclusion under MRE 608(b).

Finally, defendant's argument that the prosecutor did not provide notice required by MRE 404(b)(2) is without merit. Analysis under MRE 404(b) is inapposite because the rebuttal evidence was not admitted as substantive evidence of defendant's guilt under that rule. Indeed, the prosecutor would have no way of predicting that (1) defendant would exercise his right to testify and (2) what defendant's testimony would be if he exercised that right. The prosecutor is required to provide notice of rebuttal witnesses only in the limited situation where a defendant gives advance notice of an insanity or alibi defense. See MCL 768.20; MCL 768.20a. The rebuttal evidence was not offered "to prove a person's character to show that the person acted in conformity with character on a particular occasion" *Sabin, supra* at 56, but rather to test the credibility of defendant's testimony that he did not use or sell cocaine, and the large sum of cash he possessed was legitimately acquired. Accordingly, the rebuttal evidence was not subject to exclusion because of lack of notice under MRE 404(b)(2).

In sum, the trial court did not abuse its discretion admitting the rebuttal evidence in this case because it refuted material issues raised by defendant in his direct testimony. *Figgures, supra* at 399-400; *Spanke, supra* at 644-645. Accordingly, plain error meriting reversal did not occur. *Carines, supra* at 763, 774; *Rice, supra* at 442.

Next, defendant argues that he was denied the effective assistance of counsel because counsel did not object to the rebuttal evidence on the same grounds raised on appeal. We disagree. Defendant failed to preserve this claim by filing a motion for new trial or otherwise by creating a record in the trial court. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). Therefore, our review is limited to the existing record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id*. at 714. In order to overcome the presumption, defendant must first show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Id*. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different. *Id.* Here, the rebuttal testimony was proper and any further objection would have been futile. Accordingly, defendant cannot establish his claim of ineffective assistance of counsel. *Id*. at 715.

We affirm.

/s/ Jane E. Markey
/s/ Donald S. Owens

Judge White concurs on the basis that any error was harmless.

/s/ Helene N. White